Supreme Court, U.S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
Petitioner,

v.

JOHN G. HEIMANN, Comptroller of the Currency of the United States Department of the Treasury,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER INDEPENDENT BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Independent Bankers Association of America ("IBAA") submits this reply brief in support of its petition for a writ of certiorari.

The Comptroller contends that this Court should not grant IBAA's petition because the lower court's decision "has little continuing importance" due to the recent enactment of the Depository Institutions De-

regulation and Monetary Control Act of 1980 (the "Deregulation Act"), which confers upon the Comptroller general authority to issue legislative regulations. (Resp. Brief at 5.) That argument ignores the continuing precedential effect of the far-reaching rules of law established by the court of appeals' decision. Specifically, the lower court effectively held that a federal agency may possess *inherent* power to issue legislative rules, and that court sharply narrowed the scope of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

The enactment of the Deregulation Act does not in any manner limit the force of the lower court's decision as a precedent. Unless this Court addresses that decision, the principles articulated by the lower court will remain binding on all panels of the District of Columbia Circuit. *Brewster* v. *C.I.R.*, 607 F.2d 1369, 1373 (D.C. Cir.), *cert. denied,* 100 S. Ct. 522 (1979). The significance of reviewing these precedents, particularly the inherent rulemaking authority determination, is heightened by the fact that the District of Columbia Circuit reviews far more administrative agency actions than any other circuit.[1]

RULEMAKING AUTHORITY

The decision below held that a court may confer legislative rulemaking authority on a federal agency if the court determines that (1) such authority would aid the agency in the performance of its duties and (2) Congress has not clearly stated that the agency lacks

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[1] Annual Report of the Director of the Administrative Office of the United States Courts, 1979, Table 6 (printed in Reports of the Judicial Conference—Report of the Administrative Office of the United States Courts (1979) at 200).

such authority. The lower court's ruling already has been cited for the principle that agencies have inherent powers to effectuate statutory purposes.[2] This landmark precedent concerning inherent rulemaking power obviously has not been vitiated by the Deregulation Act.

The Comptroller also contends that "there are no decisions that conflict with the decision of the court below." (Resp. Brief at 5.) This argument ignores the conflict between the lower court's holding concerning inherent rulemaking authority and the fundamental principle, repeatedly articulated by this Court, that a federal agency may issue legislative regulations only if Congress has expressly delegated this power to the agency. *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977). *See also General Electric Company* v. *Gilbert,* 429 U.S. 125, 141-142 (1976). *Compare American Telephone and Telegraph Co.* v. *United States,* 299 U.S. 232, 235-237 (1936) *with Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

Furthermore, it should be noted that the Comptroller does not argue that this issue has been mooted by the Deregulation Act. If this Court allows the lower court's ruling to stand, IBAA member national banks and other national banks will continue to be bound by a regulation that the Comptroller has no authority to promulgate. The new legislation does not operate retroactively to overcome deficiencies in the Comptroller's rulemaking authority which existed at the time of the Credit Life Regulation's adoption. Therefore, if the

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[2] Letter from Douglas M. Costle, Administrator of EPA, to E. G. Ratering, General Motors Corporation, denying "Petition for Reconsideration of Noise Emission Standards for Truck-Mounted Solid Waste Compactors" at 6. (March 10, 1980).

Comptroller wished to promulgate the Credit Life Regulation under his new statutory authority, he would be required to commence another rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553.

With regard to the question of whether the lower court correctly ruled that 12 U.S.C. §§ 1818(b) and (n) authorize the Comptroller to issue the Credit Life Regulation as a legislative rule, the Comptroller relies on the legal generalizations that the bank regulatory agencies have broad authority to preserve the soundness of the nation's financial institutions and that considerable deference is owing to interpretations by bank regulatory agencies of their own enabling statutes. (Resp. Brief at 8.) These statements, while having meaning in appropriate situations, do not permit the Comptroller or the courts to create substantive rulemaking authority where neither the plain language of the purported rulemaking statute nor its legislative history reflect that Congress intended to delegate such authority to the agency. As this Court has noted, "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose."[3] Neither the plain language of 12 U.S.C. § 1818(b), which relates solely to cease-and-desist adjudicative proceedings, nor the plain language of 12 U.S.C. § 1818(n), which authorizes merely procedural rules, even suggest that in enacting 12 U.S.C. § 1818 Congress intended to confer legislative rulemaking power on the Comptroller. Moreover, there is absolutely nothing in the legislative history of Section 1818 which indicates congressional intent to authorize the Comptroller to issue legislative rules.

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[3] Morton v. Ruiz, 415 U.S. 199, 237 (1974).

In connection with the question of congressional intent, the Comptroller asserts that the legislative history of the Deregulation Act's rulemaking provision "was meant to clarify the Comptroller's existing rulemaking authority rather than create new authority." (Resp. Brief at 9, n.3.) Curiously, in support of this assertion he cites a House of Representatives report concerning a bill which was introduced in a previous Congress but not enacted. More pertinent sources of legislative intent are the reports concerning the Deregulation Act prepared by the Congress which passed that act, the Ninety-Sixth Congress. Those legislative documents say nothing about "clarifying" the Comptroller's rulemaking authority; to the contrary, the legislative history categorically states that the act *grants* him such authority. For example, the Senate report notes that "[a]nother amendment gives the Comptroller rulemaking authority under the Financial Institutions Supervisory Act in order to permit the Comptroller to go forward and prohibit unsafe or unsound banking practices. This authority is already possessed by the Federal Reserve and the FDIC."[4] Thus, far from supporting the Comptroller's contention that he already possessed rulemaking powers, the legislative history shows that Congress gave him this authority because it was of the view that he did not possess it.

The Comptroller also states that ". . . the Fifth Circuit previously has held that the Comptroller possesses authority to adopt substantive standards relating to the disposition of funds obtained from the sale of credit life insurance," citing *First National Bank of*

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[4] S. Rep. No. 96-368, 96th Cong., 1st Sess. 13 (1979).

LaMarque v. *Smith,* 610 F.2d 1258 (5th Cir. 1980). (Resp. Brief at 7.) The Comptroller does not specify what he means by "substantive standards," but that term certainly cannot mean legislative rules because the *LaMarque* court explicitly distinguished the Comptroller's informal directive, which was at issue in that case, from the Credit Life Regulation. *Id.* at 1264-5, n.9. Thus, the *LaMarque* case provides no support for the proposition that the Comptroller possesses substantive rulemaking authority to issue the Credit Life Regulation.

THE McCARRAN-FERGUSON ACT

In its petition IBAA has additionally sought review of the lower court's ruling that the Credit Life Regulation does not violate the McCarran-Ferguson Act, which reserves to the states the authority to regulate the business of insurance except where Congress has enacted a statute which specifically relates to the business of insurance.

As in the case of the lower court's rulemaking precedent, the McCarran-Ferguson Act ruling raises an important federal question whose significance is not limited in any manner by the enactment of the Deregulation Act. Specifically, in upholding the regulation, the court reasoned that the McCarran-Ferguson Act was not intended to affect the Comptroller's power to regulate unsafe and unsound banking practices. Under the court's analysis, the Comptroller and other federal agencies which oversee financial institutions can regulate bank activities which are part of the business of insurance by characterizing such practices as unsafe or unsound banking practices. The court's holding

thereby renders the McCarran-Ferguson Act virtually inapplicable to insurance activities of banks.

In his brief in opposition the Comptroller argues that the regulation ". . . does not require banks to sell credit life insurance . . ." and, therefore, ". . . there is no basis for petitioner's contention that the regulation would compel banks to violate state insurance laws." (Resp. Brief at 10.) This argument takes no account whatsoever of the fact that the Credit Life Regulation prohibits certain categories of *state-qualified* individuals from acting as insurance agents and authorizes national banks to act as insurance agents even though certain states prohibit them from so acting. The regulation thus overrides state laws pertaining to who can be an insurance agent. It is this overlay of federal regulation over state law which the McCarran-Ferguson Act prohibits. In other words, federal regulations run afoul of the McCarran-Ferguson Act if they intrude into an area of insurance regulation already occupied by the states. The illegality of such federal regulations thus does not depend upon a further showing that the regulated party could comply with the federal regulations only if it violated state law.

Since almost all fifty states have enacted statutes which authorize individuals, including bank personnel, to act as credit life insurance agents and several states bar national banks from acting as insurance agents, the Credit Life Regulation, by creating an additional layer of regulation which establishes the Comptroller's own peculiar requirements, violates the McCarran-Ferguson Act. *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company of America*, 359

U.S. 65, 67 (1959). *See also Lawyer's Realty Corporation* v. *Peninsular Title Insurance Co.*, 428 F. Supp. 1288 (E.D. La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977).

For the foregoing reasons, as well as for the reasons stated in the IBAA's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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